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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/566,711	03/15/2006	Mutsumi Motouri	80621035	9012
<small>465 7590 04/06/2009</small> YOUNG & THOMPSON 209 Madison Street Suite 500 ALEXANDRIA, VA 22314			EXAMINER WARE, DEBORAH K	
			ART UNIT 1651	PAPER NUMBER
			MAIL DATE 04/06/2009	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/566,711

**Applicant(s)**

MOTOURI ET AL.

**Examiner**

DEBBIE K. WARE

**Art Unit**

1651

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 31 December 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-10 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-10 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-946)
- 3) ☐ Information Disclosure Statement(s) (PTO/SE-08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

### **DETAILED ACTION**

Claims 1-10 are presented for reconsideration on the merits.

#### ***Response to Amendment***

The amendment filed December 31, 2008, has been received and entered.

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

#### ***Claim Rejections - 35 USC § 102***

Claims 1-10 are rejected under 35 U.S.C. 102(b) as being anticipated by Kato et al.

Claims are drawn to an osteogenesis promoter comprising lactoperoxidase. Also a drink comprising the same is claimed.

Kato et al teach an osteogenesis promoter which comprises lactoperoxidase, see column 4, lines 63-67 and Table 2 of column 5, and also lines 55-65 of column 5 and column 6, lines 1-11. Furthermore, a drink for promoting osteogenesis is disclosed, note column 7, lines 65-67. Furthermore, the reference discloses at col. 4, lines 67 that the composition contains 40 %wt or more of lactoperoxidase. Also the composition is disclosed to possess osteoblast growth promoting activity, col. 5, line 50.

The claims are identical to the cited disclosure and are, therefore, considered to be anticipated by the reference.

***Response to Arguments***

Applicant's arguments filed December 31, 2008, have been fully considered but they are not persuasive. The argument that Kato fails to disclose osteogenesis promoting effect, is noted, however, the reference discloses osteoblast growth promoting activity, col. 5, line 50, which reads on an osteogenesis promoting effect. The presence of the lactoperoxidase disclosed by the reference will inherently provide for an osteogenesis promoting effect. In response to applicant's argument that the specification teaches lactoperoxidase has an osteoblast differentiation promoting effect is noted, however, although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Gauns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

The argument regarding that the lactoperoxidase is not disclosed to have a purity of at least 91% is noted, however, the reference does disclose that the composition contains 40 %wt or more of lactoperoxidase. Furthermore Applicants arguments regarding the dosage of 10 mg/day is noted, however, the claims are not limited to this dosage and this is merely an optional dose because it has been placed in the dependent claims and not in the independent claims. With respect to claims 9-10 and the language "consisting essentially of" the Kato reference clearly discloses that the lactoperoxidase as present in equal or more above 40% as compared to the other ingredients that Kato may disclose shows that the enzyme is critical to their composition. Therefore, Applicants arguments are not persuasive and the rejection is sustained.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

All claims fail to be patentably distinguishable over the state of the art discussed above. Therefore, the claims are properly rejected. The references listed on the PTO-1449 form have been ordered and these will be reviewed and a copy of the PTO-1449 Form will follow shortly.

No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to DEBBIE K. WARE whose telephone number is (571)272-0924. The examiner can normally be reached on 9:30-6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mike Wityshyn can be reached on 571-272-0926. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/DKW/  
Deborah K. Ware  
Examiner  
Art Unit 1651

/David M. Naff/  
Primary Examiner, Art Unit 1657